SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 887

WILLIAM L. GREENE, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 4, 1963

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES COURT OF CLAIMS

No. 153-62

WILLIAM L. GREENE, Plaintiff,

v.

THE UNITED STATES, Defendant.

PETITION—Filed May 7, 1962

1. Plaintiff, William L. Greene, is a citizen of the United States who maintains his legal residence at Weems Creek Drive, Route 4, Annapolis, Maryland.

2. This action is brought to obtain monetary restitution pursuant to Paragraph 26, Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, 32 C.F.R., Pt. 67, issued February 2, 1955, and to obtain restitution upon a claim founded upon the Constitution of the United States. The jurisdiction of this Court is invoked under Sections 1491(1) and (3), Title 28, United States Code.

3. Prior to April 23, 1953, the plaintiff was employed as vice-president and general manager of Engineering and Research Corporation (ERCO), a business located at Riverdale, Maryland, and devoted primarily to developing and manufacturing various mechanical and electronic products. ERCO did classified work for various armed services. In 1951, in connection with a classified research project for the [fol. 2] Navy, ERCO entered into a security agreement pursuant to which industrial security requirements were contractually imposed.

4. On August 9, 1949, plaintiff had been given a confidential clearance by the Army. On November 9, 1949, plaintiff had been given a top secret clearance by the Assistant Chief of Staff G-2, Military District of Washington.

On February 3, 1950, plaintiff had been given a top secret clearance by the Air Material Command. All of these clearances were pursuant to industrial security requirements contractually imposed upon ERCO employees.

5. On December 11, 1951, plaintiff was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that "access by you to contract work and information [at ERCO] . . . would be inimical to the best interests of the United States" and that his clearances were being revoked. He was also advised that he could seek a hearing before the Industrial Employment Review Board (IERB), and plaintiff took that course of action.

6. Plaintiff, with counsel, appeared at hearings before the IERB with respect to certain allegations made about his past associations. The Government presented no witnesses at these hearings and plaintiff had no opportunity to confront or question persons who had allegedly made statements adverse to him. On January 29, 1952, on the basis of these hearings and of the confidential reports, the IERB reversed the action of the PSB and informed plaintiff and ERCO that plaintiff was authorized to work on secret contract work.

7. On April 17, 1953, following the abolition of the PSB and the IERB, the Secretary of the Navy wrote ERCO that, on a review of the case, he had concluded that plaintiff's "continued access to Navy classified security information [fol. 3] [was] inconsistent with the best interests of National Security." No hearing preceded this notification. The Secretary further requested ERCO to exclude plaintiff "from any part of your plants, factories or sites at which classified Navy projects are being carried out [and] to bar him access to all Navy classified information." ERCO had no choice but to comply with this request and plaintiff was in fact discharged by ERCO on April 23, 1953.

8. On October 13, 1953, plaintiff was advised that the Navy had requested the Eastern Industrial Personnel Security Board (EIPSB) to make a final determination concerning plaintiff's status. A hearing before the EIPSB took place on April 28, 1954, again without any confronta-

tion by plaintiff of adverse witnesses, if any. Thereafter the EIPSB affirmed the action of the Secretary of the Navy and ruled that granting clearance to plaintiff for access to classified information was "not clearly consistent with the interest of national security."

9. On September 16, 1955, plaintiff requested review by the Industrial Personnel Security Review Board. On March 12, 1956, plaintiff received a letter from the Director of the Office of Industrial Personnel Security affirming the determination of the EIPSB.

10. In 1954, following the EIPSB determination, plaintiff filed a complaint in the United States District Court for the District of Columbia asking for a declaration that the revocation of his clearance was unlawful, for an order restraining Department of Defense officials from acting pursuant to such revocation, and for an order requiring such officials to advise ERCO that the revocation was void. The District Court granted the Government's motion for summary judgment, 150 F. Supp. 958, and the Court of Appeals affirmed, 103 App. D.C. 87, 254 F. 2d 944.

[fol. 4] 11. On June 29, 1959, following review of the case by the Supreme Court, that Court determined that in the absence of explicit authorization from either the President or Congress, the Secretaries of the Armed Forces were not authorized to deprive plaintiff of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination of adverse witnesses. Greene v. McElroy, 360 U.S. 474. The judgment reached by the lower courts was accordingly reversed.

12. On December 14, 1959, pursuant to the decision and judgment of the Supreme Court, the District Court ordered "that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized" and "that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States."

13. On December 28, 1959, plaintiff made a formal demand of the General Counsel of the Department of the Navy "for monetary restitution from the Department of the Navy and/or the Department of Defense pursuant to Section 26 of the Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553."

14. On January 11, 1960, the General Counsel of the Department of the Navy acknowledged the demand and requested that certain dates and financial data be supplied, stating that if such information were supplied the claim would receive "such consideration as it deserves." A statement of plaintiff's legal position respecting the applicability of Section 26 was also requested.

15. On April 20, 1960, plaintiff supplied the General [fol. 5] Counsel of the Department of the Navy with the requested information and statement of legal position. Plaintiff stated under oath that he had incurred a $49,960.41 loss of earnings from the date of his dismissal (April 23, 1953) up to December 31, 1959.

16. On January 4, 1961, having been advised that his claim had been forwarded to the Director of the Office of Security Policy of the Department of Defense for final determination, plaintiff renewed his claim in a letter addressed to the said Director. The plaintiff, understanding that the Director was disposed to deny the claim, also requested an opportunity to know and rebut the legal representations made in support of any disposition to deny the claim.

17. On February 8, 1961, the said Director responded that plaintiff might submit in writing any additional material as to his legal position by March 3, 1961. The Director also stated that "this Department is prepared, at his [plaintiff's] request, to consider his case under the above mentioned 1960 Review Regulation [Industrial Personnel Access Authorization Review Regulation, DOD Directive 5220.6, dated July 28, 1960] and to take such action as may be necessary to reach a final determination as to whether it is in the national interest to grant him an authorization for access to classified information."

18. On March 2, 1961, plaintiff wrote to the said director restating his legal position as to the applicability of Section 26 and declining to request a reconsideration of his case under the 1960 regulation. Plaintiff therein stated that he could not

> . . . agree to any procedure which might result in a new, adverse determination which could then be used by the Department to bolster the argument that Section 26 does not apply to this case. And such a possible determination—whether made by the Screening Board [fol. 6] or the Hearing Board—could arguably have a retroactive effect so as to give the semblance of legality to the clearance revocation dating back to 1953. Quite clearly the Supreme Court determination that this revocation was unlawful is not subject to a subsequent administrative determination that the revocation was lawful. That is particularly true where the purported effect of the latter determination might retroactively destroy a claim for loss in earnings.

19. On March 16, 1961, the said Director responded by re-emphasizing the Department's "willingness to process the question of Mr. Greene's current eligibility for access authorization under the provisions of the 1960 Review Regulation."

20. On April 14, 1961, plaintiff inquired of the said Director as to whether, pursuant to Paragraph V.B.1 of DOD Directive 5220.6, dated July 28, 1960, the Director had authority to reopen the case on his own motion and take such steps as might be deemed necessary to complete reconsideration without a formal request from the plaintiff.

21. On May 15, 1961, the said Director replied that "As has been indicated previously, this Department is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation."

22. On June 1, 1961, the Deputy General Counsel of the Department of the Navy advised plaintiff that "In accordance with Department of Defense policy, it has been determined by the Department of Defense that Mr. Greene does

not qualify for monetary restitution under the provisions of Paragraph 26 and that, therefore, his claim, being premature, cannot be given further consideration at this stage of the administrative proceedings." It was further stated that "the Department of Defense has informed you that it is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regula-
[fol. 7] tion, and that if he does so request, prompt action will be taken thereon."

23. The aforesaid July 28, 1960 Review Regulation has no application to plaintiff's claim for monetary restitution under Section 26, DOD Directive 5220.6, issued February 2, 1955, and plaintiff is not bound to exhaust any remedies under the July 28, 1960 Review Regulation before making such claim or bringing this suit.

24. The Secretary of Defense and/or his subordinates have refused and continue to refuse to make monetary restitution to the plaintiff as required by and in accordance with the decision of the Supreme Court in Greene v. McElroy, 360 U.S. 474, the subsequent order of expungement by the District Court, and the provisions of Section 26, DOD Directive 5220.6, issued February 2, 1955.

25. By virtue of the aforesaid regulation and judicial determinations, plaintiff is entitled to receive monetary restitution in an amount equal to the salary or pay which he would have earned at the rate he was receiving on the date of his suspension from employment by ERCO less his earnings from other employment. During the period from April 23, 1953, to April 23, 1962, plaintiff had earnings from other employment in the amount of $95,039.59. During the same period he would have had earnings from employment with ERCO, at the rate he was receiving on the date of his suspension, in the amount of $162,000.00.

26. By virtue of the foregoing illegal and unwarranted actions and refusals by the United States to grant plaintiff security clearances, augmented by the refusal to give plaintiff monetary restitution for the actual losses sustained by virtue of such illegal and unwarranted actions, plaintiff has also suffered permanent and irreparable loss to his reputa-

[fol. 8] tion and his professional career and his future earning capacity, constituting a deprivation of liberty and property in violation of the Fifth Amendment to the Constitution of the United States. Plaintiff is accordingly entitled to receive restitution, compensation or damages, by virtue of such deprivation, in an amount equal to the monetary restitution payable under Section 26, DOD Directive 5220.6, issued February 2, 1955, for the loss of earnings to the date of this petition, and for such amount as is equal to such monetary restitution for his future loss of earnings.

Eugene Gressman, 1730 K Street, N.W., Washington 6, D. C.;

Carl W. Berueffy, 650 Washington Building, Washington 5, D. C., Attorneys for Plaintiff.

[fol. 9]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S MOTION TO SUSPEND PROCEEDINGS AND DENIAL THEREOF

Defendant moves to suspend proceedings in this case pending plaintiff's pursuit and completion of the administrative remedy available to him in the Department of Defense. In support of this motion, defendant states as follows:

This case is identical in all material aspects to the cases of *Kreznar* v. *United States*, C. Cls. No. 47-60, *Spector* v. *United States*, C. Cls. No. 48-60 and *Dressler* v. *United States*, C. Cls. No. 59-60. In these cases, the Court, by order filed June 22, 1962, directed that proceedings "* * * be and the same are suspended pending plaintiffs' pursuit and completion of the administrative remedies available through the Department of Defense, which proceedings are to be instituted and completed within a reasonable time." [fol. 11] In the instant case, plaintiff is suing for monetary restitution, just as are the plaintiffs in the *Kreznar*, *Spector* and *Dressler* cases, *supra*. Plaintiff relies on the

same statutes and regulations relied upon by plaintiffs in those three cases. Those cases were fully briefed and argued, including argument as to the scope and effect of the decision of the Supreme Court in *Greene* v. *McElroy*, 360 U.S. 474 (1959). After due deliberation, the Court ordered that they be suspended pending pursuit of the administrative remedy available in the Department of Defense.

Since the instant case is identical in all material aspects to the *Kreznar*, *Spector* and *Dressler* cases it should also be suspended pending pursuit and completion of the administrative remedy in the Department of Defense, and defendant requests that the Court so order.

Respectfully submitted,

/s/ Joseph D. Guilfoyle, Acting Assistant Attorney General, Civil Division.

/s/ Lawrence S. Smith, Attorney, Civil Division, Department of Justice

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[fol. 14]

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UNITED STATES COURT OF CLAIMS

No. 153-62

WILLIAM L. GREENE, Plaintiff,

vs.

THE UNITED STATES

DEFENDANT'S MOTION TO SUSPEND PROCEEDINGS

DENIED with defendant granted 30 days from the date hereof to file its answer: September 5, 1962.

W E D
William E. Day, Commissioner

[Stamp—Filed Jul 5 1962—COURT OF CLAIMS]

[fol. 30] [File endorsement omitted]

IN THE UNITED STATES COURT OF CLAIMS

No. 153-62

[Title omitted]

ORDER OF COMMISSIONER SUSPENDING PROCEEDINGS—December 5, 1962

In view of the action this day by the court in *Stephen L. Kreznar* v. *The United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense.

/s/ William E. Day, Commissioner.

[fol. 31] [File endorsement omitted]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

PLAINTIFF'S REQUEST FOR REVIEW OF COMMISSIONER'S ORDER UNDER RULE 37(d)(5)—Filed December 10, 1962, AND DENIAL THEREOF—December 20, 1962

Pursuant to Rule 37(d)(5), plaintiff hereby requests that this Court review and vacate the *sua sponte* order of Commissioner William E. Day, entered on December 5, 1962,* on the ground that it was improvidently issued, represents an abuse of discretion and adversely affects substantial rights of the plaintiff. More particularly, plaintiff asserts:

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* The order reads: "In view of the action this day by the court in *Stephen L. Kreznar* v. *The United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense."

Denied Dec 20 1962
DNL*
* Don N. Laramore, Acting Chief Judge.

1. On September 5, 1962, Commissioner Day denied the defendant's motion to suspend proceedings pending pursuit of administrative proceedings made available by the [fol. 32] Department of Defense. That motion was premised on this Court's orders in the *Kreznar* (No. 47-60), *Spector* (No. 48-60) and *Dressler* (No. 59-60) cases on June 22, 1962, suspending those proceedings until administrative remedies had been exhausted. Plaintiff herein filed an opposition to the defendant's motion and the defendant in turn replied to that opposition. Based upon a full consideration of the matter, *including this Court's actions in the other three cases*, the Commissioner denied the motion to suspend and ordered the defendant to file its answer.

Under Rule 37(d)(5), the Commissioner's order of September 5, 1962, denying the motion, became "the order of the Court unless within 5 days after the action thereon a dissatisfied party files with the Court a request for review of the Commissioner's action." No such request for review was filed by the defendant. And by virtue of the foregoing rule, the September 5 order became the order of this Court.

Thus the Commissioner lacked jurisdiction and authority to overrule or vacate what has become, by virtue of Rule 37(d)(5) the ruling of this Court. His order of December 5, 1962, cannot stand.

[fol. 33] 2. Plaintiff does not need or want any access authorization under the 1960 Directive. The administrative remedy said to be available to him has no relationship to this case or to any relief which he seeks. It has relevance only if plaintiff were in need of *present* security clearance, which need is not existent.

3. This case is *not* identical in all material respects with *Kreznar* v. *United States*, C.Cls. No. 47-60, *Spector* v. *United States*, C.Cls. No. 48-60, and *Dressler* v. *United States*, C.Cls. No. 59-60, wherein this Court on June 22, 1962, directed that proceedings be suspended pending pursuit of Department of Defense proceedings. Here, unlike the aforementioned three cases, there is a claim grounded not only in the provisions of Par. 26, DOD Directive 5220.6, 20 Fed. Reg. 1553 (Feb. 2, 1955), but also in the provision

of the due process clause of the Fifth Amendment of the United States Constitution (Paragraphs 2 and 26 of Petition). Where such a constitutional claim has been asserted, the doctrine of exhaustion of administrative remedies has no application. See *Soriano* v. *United States*, 352 U.S. 270, 274-275.

4. The doctrine of exhaustion of administrative remedies, moreover, has no relevance where, as here, the so-called administrative remedy is a permissive or alternative method of relief rather than a condition precedent to court action. Par. V.B.I. of DOD Directive 5220.6 (July 28, 1960), upon which defendant relies in this connection, provides in pertinent part:

> Decisions rendered under any industrial personnel review program prior to the effective date of this Regu- [fol. 34] lation which denied or revoked an access authorization *may* be reconsidered by such boards as the Director deems appropriate at the request of the applicant, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. [Emphasis added.]

The use of the word "may" instead of "shall" in the foregoing regulation clearly indicates its permissive or discretionary nature, in distinction from any mandatory characteristic. And in that situation, it has been authoritatively determined that a claimant may waive such an alternative remedy and proceed at once to an adjudication in this Court. *Smithmeyer* v. *United States*, 147 U.S. 342, 357-358. Plaintiff's right of action against the United States has accrued and this Court has full jurisdiction over it pursuant to 28 U.S.C. §§1491 (1) and (3). The fact that there may be an alternative route of recovery is irrelevant. See also *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 634-636; and see *Ogden* v. *Zuckert*, 298 F. 2d 312, 317 (App. D.C.), and cases there cited.

5. As stated by the Supreme Court in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63, the doctrine of exhaustion of administrative remedies "applies where a

claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.". Such is certainly not the case here.

[fol. 35] Far from failing to exhaust the pertinent administrative remedy, plaintiff has here made every conceivable effort to process his claim for monetary restitution before the appropriate administrative officials. See the facts set forth in Paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the Petition herein. Plaintiff made certain that all administrative avenues had been tried and exhausted before filing suit in this Court.

What the defendant is really proposing now is that the plaintiff seek administrative relief not as to the claim in issue here but as to a new and entirely different matter. A request for a hearing under Par. V.B.I. of the July 28, 1960, Directive is not one directed to the problem at issue in this case—i.e., the amount of monetary restitution, under Sec. 26 of the 1955 Directive, to which plaintiff is entitled in light of the Supreme Court's holding in *Greene* v. *McElroy*, 360 U.S. 474, that there was no authorization for the regulations under which plaintiff has been deprived of his job.

Rather the hearing envisaged by Par. V.B.I. of the 1960 Directive is one directed toward taking "such other steps as may be deemed necessary to complete reconsideration of the case." * What that plainly means is that the Director [fol. 36] can reconsider the problem of revocation *de novo* and take "such other steps as may be deemed necessary" to conclude that the original revocation was proper on its merits (despite its lack of authorization) and that it should be continued in effect. Thus could be wiped out any claim

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* The Director is also authorized, as the result of such hearing, "to vacate such final determination and all subsequent administrative action predicated thereon" if he finds the determination to have been unauthorized at the time it was made. Here, however, the Supreme Court has already found the determination unauthorized (360 U.S. 474) and the District Court has ordered all administrative rulings, orders and determinations relative to the unauthorized revocation annulled and expunged from the records of the United States Government. Paragraph 12 of Petition.

for restitution or damages under the 1960 Directive for the long period during which the revocation was unlawful for lack of authorization.

Additionally, the monetary claim here made under Par. 26 of the 1955 Directive is not the monetary claim which the Department of Defense would consider under the 1960 Directive. Section V.C. of the latter permits recognition of a monetary claim of the type here involved only if a new and favorable determination is made on the merits which is thought to be "clearly consistent with the national interest." Plaintiff maintains—and this is the heart of his case in this Court (see Paragraph 23 of Petition)—that he is not compelled to initiate a new and independent administrative proceeding under the 1960 Directive before seeking monetary recovery under the 1955 Directive for [fol. 37] a past illegal revocation. Plaintiff does not need or desire access authorization under the 1960 Directive.

In any event, the exhaustion doctrine can apply only where the available administrative relief is identical with that sought in court. *United States* v. *Western Pacific R. Co., supra.* That not being the case here, the suspension requested by the defendant is unwarranted.

6. To the extent that the 1960 Directive permits the Director in his discretion to reconsider the original revocation action, plaintiff is not required to exhaust such a reconsideration. As long ago as 1916 the Supreme Court held, *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 48, that "As the law does not require an application for a rehearing to be made and its granting is entirely within the discretion of the Commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order." See also *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274; *Levers* v. *Anderson*, 326 U.S. 219.

These authorities culminated in the enactment of Section 10(c) of the Administrative Procedure Act, 5 U.S.C. §1009 (c), providing that agency action otherwise ripe for judicial review "shall be final for the purposes of this subsection whether or not there has been presented or determined any application for . . . any form of reconsideration."

That command of Congress alone makes unnecessary any further request for administrative action.

[fol. 38] 7. Finally, exhaustion of administrative remedies is unnecessary where—as here—those remedies are clearly inadequate. See *Smith* v. *Illinois Bell Co.*, 270 U.S. 587, 591. The inapplicability of the doctrine is particularly clear where the judicial remedy involved depends upon a doubtful construction of a statute or regulation. See *Union Pacific Ry.* v. *Board*, 247 U.S. 282.

In this case, the administrative remedy is inadequate because, as already indicated, it involves different issues and different regulations than those involved in the case before this Court. The instant suit depends upon an interpretation and application of Par. 26 of the 1955 Directive, an issue which the proposed proceeding will not touch. No administrative proceeding could thus be more inadequate in this sense. And since this court action does involve a legal question as to the interpretation of Par. 26 of the 1955 Directive, not only is it impossible to expect any further administrative action thereon, but if the Director were to rule on the interpretation of Par. 26 it would not be binding or even particularly helpful to this Court. The entire issue, in other words, is presently before this Court and the Director's interpretation can be adequately formulated and argued by counsel for the defendant. No further administrative proceeding is necessary in these circumstances.

[fol. 39] Conclusion

For these various reasons, the Commissioner's order of December 5, 1962, should be reversed and vacated and the order dated September 5, 1962, should be reinstated as the order of this Court.

Respectfully submitted,

/s/ Eugene Gressman, 1730 K Street, N.W., Washington, D. C., Attorney for Plaintiff.

[fol. 40]

IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

DEFENDANT'S OPPOSITION TO PLAINTIFF'S REQUEST FOR REVIEW OF THE COMMISSIONER'S ORDER—Filed December 13, 1962

Defendant opposes plaintiff's request for review,[1] filed December 10, 1962, of the Commissioner's Order of December 5, 1962, directing suspension of proceedings pending pursuit of administrative remedies. The order of the Commissioner is proper; is in accord with the Court's action in three other cases, *Kreznar* v. *United States*, No. 47-60; *Spector* v. *United States*, No. 48-60; and *Dressler* v. *United States*, No. 59-60; and should not be vacated, as plaintiff requests.

In support of defendant's position, defendant states as follows:

I. Plaintiff's Points 1 through 7.

1. Point 1 of plaintiff's request for review states that on September 5, 1962 the Commissioner denied defendant's [fol. 41] motion to stay proceedings pending pursuit of administrative remedies; that defendant filed no request for review, as provided for in Rule 37; and that the order therefore became the order of the Court.

This is erroneous. The order of September 5, 1962 that was served on the defendant, denying defendant's motion to suspend, was an order of the Court, not an order of the Commissioner. It is on the Court's regular order form, issued by the Clerk. There is nothing on its face to show whether defendant's motion to suspend was considered by the Commissioner.

2. Point 2 of plaintiff's request for review states that he does not need or want any access authorization under

[1] Plaintiff inadvertently states that his request is made under Rule 37(d)(5) instead of Rule 37(d)(4). He apparently cites the January 16, 1961 text of the rule instead of the later version, effective March 15, 1962. The discrepancy is of no consequence insofar as this matter is concerned.

the 1960 Directive and that the "administrative remedy said to be available to him has no relationship to this case or to any relief which he now seeks." This is incorrect. The administrative remedy available in the Department of Defense is clearly relevant to his claim for money. This matter was fully briefed and argued in the *Kreznar*, *Spector* and *Dressler* cases. He can recover the monetary restitution in that administrative remedy which he seeks in this suit, and it is essential that he exhaust that remedy prior to proceeding further in this Court. In fact, the effect of the Supreme Court decision in his case, *Greene* v. *McElroy*, 360 U.S. 474 (1959), upon which he relies, was extensively briefed and argued in the *Kreznar*, *Spector* and *Dressler* cases. After hearing argument and considering the briefs of the parties, the Court ruled that the proceedings should be suspended while the administrative remedy was being exhausted. There is no reason to rule differently in the [fol. 42] instant case. Proceeding should be suspending while that remedy is being pursued; there is ample time, after the administrative process has been completed, for the Court to consider plaintiff's case if plaintiff can then show that the administrative remedy was inadequate or legally deficient. *Gusik* v. *Schilder*, 340 U.S. 128, 133 (1950).

3-7, inclusive. The text of points 3 through 7 of plaintiff's request for review is identical with points 1 through 5 of plaintiff's opposition, filed July 24, 1962, to defendant's motion to suspend proceedings. Therefore, defendant requests that its reply thereto, filed August 27, 1962, answering each of these points, be incorporated herein by reference in reply to these arguments.

II. The Supreme Court Has Held That Suspension Of Procedures Is The Proper Procedure.

The Supreme Court has held that even though the administrative remedy became available after a suit had been instituted in court, it must nevertheless be exhausted. *Gusik* v. *Schilder*, 340 U.S. 128 (1950). This point was made in the *Kreznar*, *Spector* and *Dressler* cases, and in defendant's reply to plaintiff's opposition to defendant's motion to suspend proceedings (point VI, pp. 5-6), filed

August 27, 1962. It is requested that this argument, which plaintiff has made no attempt to answer, also be incorporated herein by reference.

[fol. 43] Conclusion

This suit should be suspended while the administrative remedy in the Department of Defense is being pursued. The Commissioner's order, dated December 5, 1962, is correct and should be upheld by the Court.

Joseph D. Guilfoyle, Acting Assistant Attorney General, Civil Division.

Lawrence S. Smith, Attorney, Civil Division, Department of Justice.

[fol. 45] [File endorsement omitted]

[fol. 46]

IN THE UNITED STATES COURT OF CLAIMS

CLERK'S CERTIFICATE

I, Frank T. Peartree, Clerk, United States Court of Claims, do hereby certify that the foregoing are the original copies as filed in this court of the petition, defendant's motion to suspend proceedings, order of the commissioner denying defendant's motion to suspend proceedings, plaintiff's opposition to defendant's motion to suspend proceedings, defendant's reply to plaintiff's opposition to defendant's motion to suspend proceedings, order of commissioner suspending proceedings, plaintiff's request for review of commissioner's order under Rule 37(d)(5), order of the court denying plaintiff's request for review by Laramore, Acting Chief Judge, and of defendant's opposition to plaintiff's request for review of the commissioner's order, in the above-entitled case.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at Washington, D. C., this 15th day of February, A. D., 1963.

(Seal)

Frank T. Peartree, Clerk, United States Court of Claims.

[fol. 47]

SUPREME COURT OF THE UNITED STATES

No. 887, October Term, 1962

WILLIAM L. GREENE, Petitioner,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—April 22, 1963

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.